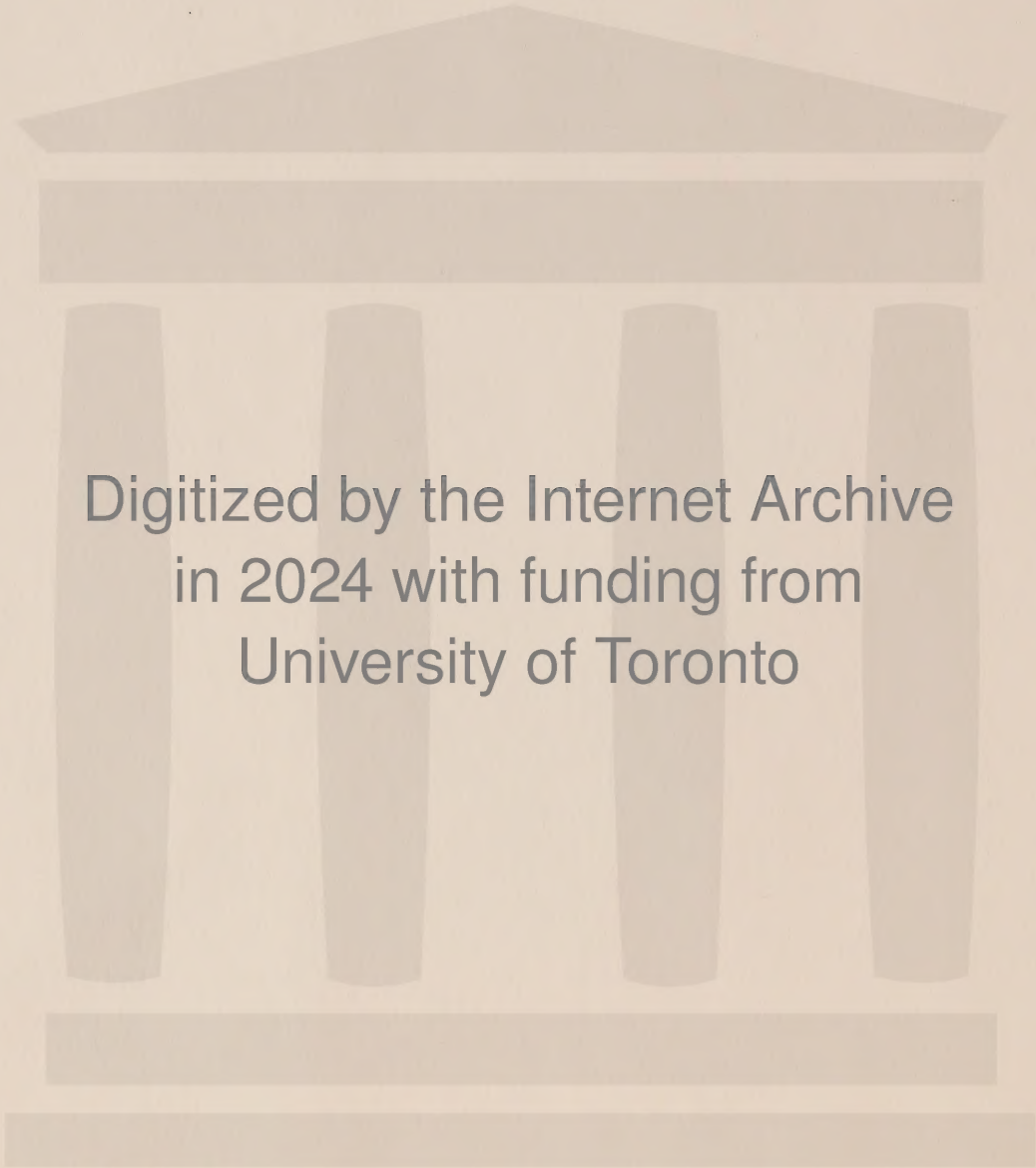

PROPOSED REFORM OF THE ONTARIO LABOUR RELATIONS ACT

A Discussion Paper from the Ministry of Labour

November 1991

Ministry of Labour
Ontario

Ontario Ministry of Labour
Ministère du Travail de l'Ontario

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November, 1991

A Message from the Minister of Labour.

I am pleased to provide you with a copy of the Ministry of Labour's Discussion Paper on Proposed Reform of the Labour Relations Act.

The government is committed to updating the Act and has developed reform proposals following several months of careful review and analysis. The review process was assisted by recommendations received from an external advisory committee and by related submissions from employer associations and trade unions.

Now that the government has identified its own preferred options for reform, I look forward to a period of constructive discussions with a broad range of groups and individuals on our approach to reform of the Act.

We have much to learn from listening to the views of the public and will be receiving written submissions as part of this stage in the process through until February 14, 1992.

In the meantime, I will be visiting communities across Ontario to hear directly from the public about Labour Relations Act reform options.

Following completion of this round of consultations it is the government's intention to introduce legislation in the Spring of 1992. This will be followed by further public discussion of reform proposals through the legislative committee process.

Thank you for giving this important matter your time and consideration. I look forward to hearing from you.

Bob Mackenzie

Bob Mackenzie
MPP Hamilton East
Minister

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Le présent document est aussi disponsible en français.

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1.0 INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

This discussion paper has been prepared to assist in the consultation process on reform of the Labour Relations Act (the Act). Its purpose is to elicit a wide range of opinion and input from employers, trade unions, employees and community groups on the shape and impact of proposed and possible reforms to the Labour Relations Act.

For more than four decades, public policy in Ontario has promoted the legitimacy of collective bargaining. Trade unions have become an important vehicle for employee participation and for establishing wages and other employment conditions. Collective bargaining has proven its value.

But the economy, the composition of our workforce and the workplace itself are undergoing rapid and fundamental change. Growing numbers of women and visible minorities are entering the workforce - often in part-time and low-income jobs in the service and retail sectors of the economy. They are being left behind. Legal technicalities, resistance to attempts by employees to organize, and the outdated assumptions enshrined in current law have combined to deny access to collective bargaining to large numbers of employees who may otherwise wish to organize. This is why the government made a commitment in the Throne Speech to facilitate the right to organize.

The government is also committed to responding to the challenges and opportunities presented by fundamental changes to the structure of our economy and to the nature of work, in ways which will create and sustain prosperity for all Ontarians. The government believes that this goal will be achieved most effectively by increasing cooperation and by developing partnerships at every level of the economy - particularly in Ontario's workplaces. One element of the government's strategy in this area includes reform of the Labour Relations Act.

It has been more than 15 years since any substantial review of, and amendments to, the Act. The government believes that it is now appropriate that the Act be modernized and revitalized to respond to the changing needs of Ontario's workforce and economy.

The Ministry of Labour has examined a number of problems arising from the present design and operation of the Act, many of which impede the right to organize and the development of cooperative relationships between employers and trade unions. This paper outlines various legislative proposals intended to respond to these problems, together with certain initiatives designed to assist employers, trade unions and employees in dealing with adjustment and change in the workplace.

In most cases, this paper discusses a potential area of reform, and sets out the government's preferred option, based on its present assessment of the need for legislative change. In a limited number of areas, where the government has not determined whether reform is appropriate, this paper simply identifies a potential problem with no specific proposal for reform.

In all cases, however, the government's objective is to promote broad and meaningful public consultation on the real issues and options pertaining to labour relations reform. Too often in the past several months, public debate and discussion has related more to proposals made by others to government, rather than focusing on the actual views of government itself. Prior to determining the final content of any legislative reform package, the government is committed to hearing from the public about the various reform options discussed in this paper.

At various points in this paper, key questions are asked to help focus discussion and to raise options for consideration during the consultation process. These questions are in no way intended to limit the scope and nature of public input.

How You Can Participate

Over the coming months, the government will be conducting consultations on a province-wide basis concerning reform of the Labour Relations Act. This process will be extensive, involving a large number of formal and informal meetings with interested individuals and groups. As part of this process, Bob Mackenzie, the Minister of Labour, will travel to a number of Ontario communities to hear, first-hand, reactions to the government's proposals and options for reform.

Following a careful review of the meetings and of written submissions made during this process, the government intends to introduce legislation in the Spring, 1992 session of the Legislature. There will then be another round of consultations, this time focusing on the proposed legislation itself, through the committee process of the Legislature.

The government invites written submissions from all interested parties. These submissions should be received by the Ministry of Labour no later than Friday, February 14, 1992.

Written submissions should be sent to the following address:

Bob Mackenzie M.P.P.
Minister of Labour
Labour Relations Act Reform
400 University Avenue
14th Floor
Toronto, Ontario
M7A 1T7

For additional copies of this discussion paper, or for inquiries about the consultation process, please call the Ministry of Labour, Communications Branch, at (416) 326-7400.

1.2 THE LABOUR RELATIONS ACT

The Labour Relations Act (the Act) governs labour relations in the private sector, including the construction industry, and in parts of the public sector. Municipalities are covered by the Act, as are public utilities and publicly-funded agencies. Hospital employees are covered by the Act, except that the right to strike is replaced with interest arbitration under the Hospital Labour Disputes Arbitration Act.

The separate collective bargaining legislation that applies to police and firefighters, Crown employees and teachers is not being considered as part of this reform process. The Crown Employees Collective Bargaining Act is being reviewed as part of a separate process.

The Labour Relations Act:

- Provides for employees to organize into trade unions where a majority of employees support unionization;
- Prohibits unfair employer interference in lawful trade union activity, as well as unfair behaviour by trade unions;
- Sets out the process for collective bargaining for collective agreements, including the duty to bargain in good faith and to make reasonable efforts to conclude a collective agreement;
- Prohibits strikes and lockouts during the term of a collective agreement;
- Establishes the grievance arbitration process for the resolution of workplace disputes during the term of a collective agreement; and
- Establishes the Ontario Labour Relations Board (OLRB) to hear applications and complaints made under the Act.

1.3 THE GOVERNMENT'S SOCIAL AND ECONOMIC AGENDA

It is important to situate reform of the Labour Relations Act in the overall context of the government's social and economic objectives. Labour relations reform, while essential to the government's objectives, is only one element in an overall agenda for renewal of Ontario's economy, which includes:

- Developing an industrial strategy designed to promote innovation and enhance Ontario's competitive advantage. The strategy will provide a framework which will set the direction for many of the government's economic renewal initiatives. A related initiative is underway to establish methods for financing industrial growth and restructuring.

- Transforming the Province's training system by establishing the Ontario Training and Adjustment Board (OTAB). Under OTAB, Ontario's training and adjustment programs and services will be directed by the labour market partners to ensure responsiveness to the special needs of employers and employees in our changing economy. OTAB's objectives include increasing the quantity and quality of training in order to develop the highly skilled, high quality workforce necessary to effectively compete in the global economy;

- Investing in infrastructure. The government is continuing to invest in the physical infrastructure which Ontario needs to do business and to maintain our quality of life. The government is also examining various initiatives to develop the infrastructure of the future - the advanced communications networks of the information economy;

- Encouraging worker investment and ownership in Ontario companies, in a manner which recognizes the benefits of worker participation for both labour and business;

- Working towards employment equity legislation following public consultations. Employment equity legislation is intended to promote fairness in the workplace for Aboriginal peoples, persons with disabilities, racial minorities and women. In promoting the more effective use of human resources, employment equity can also play an important role in Ontario's economic recovery; and

- Moving ahead with reform of the social assistance system so that it can become an empowering program that helps people achieve self-sufficiency rather than trapping them in poverty. Active labour market policies and training strategies are being developed which will provide social assistance recipients with opportunities for training and a better chance of obtaining work when they finish training.

Together with labour relations reform, all of these initiatives reflect a deliberate decision on the part of the government that Ontario's future economic success in the new global economy depends upon its ability to compete through a highly-skilled, educated and motivated workforce.

It is sometimes argued that trade union representation and collective bargaining restrict an employer's ability to compete by lowering wage costs, and that lower wages are the key to competitiveness. The government believes that Ontario cannot possibly compete on this basis, because there will always be employers in another country or region that are willing to bid less on low-wage, low-skill work.

Moreover, experience has shown that jurisdictions and companies which pursue a low wage strategy rarely invest in the development of workforce skills. An alternative strategy favoured by this government is one which recognizes that improving workforce training, skills and participation is fundamental to our ability to compete in the emerging technology and information-based global economy. The government believes that labour relations reform is an integral part of this strategy because it can increase employee participation in the workplace, result in stronger partnerships and cooperation between the workplace parties and encourage alternatives to traditional adversarial relationships.

1.4 THE NEED FOR LABOUR RELATIONS ACT REFORM

For more than forty years, collective bargaining has been at the centre of government policies designed to support fair and productive workplaces in Ontario. The collective bargaining process has been durable and successful because of its unique ability to respond to workplace concerns and issues in the context of a market economy. Collective bargaining enables government to leave the fashioning of terms and conditions of employment to the voluntary agreement of the workplace parties, thereby decreasing the need for direct government regulation and intervention. In this sense, meaningful access to collective bargaining and acceptance of our economic system go hand in hand.

Over the past 15 years, however, since the Act was last subject to comprehensive review, there has been a fundamental restructuring of Ontario's economy, its workplaces, the composition of the workforce, and the nature of the jobs workers perform. Attitudes to work are also changing. Employees are asking for, and expecting, greater participation in the workplace. Collective bargaining can respond to these needs by granting employees effective participation in workplace decision-making. In order to work, however, collective bargaining must be accessible to all employees in the workforce on a fair and equitable basis.

The Act Should Facilitate And Not Impede Access to Collective Bargaining

The Act and its procedures were originally designed to respond to the needs of a large, stable workforce consisting of full-time (usually male) workers performing manufacturing jobs. This picture - and the ability of the Act to respond to the changing characteristics of work, workplaces and the workforce - has changed dramatically over the past 15 years.

Work is changing:

- Many full-time skilled manufacturing jobs permanently lost in the recession have been replaced by part-time, semi-skilled jobs in the service sector.

- Involuntary part-time employment (positions filled by those who cannot find full-time jobs) is also increasing. In 1990, women accounted for two-thirds of those workers who had taken part-time jobs because they could not find full-time work.

- Almost 90% of part-time workers are concentrated in the service sector, with about one half of the part-time work force in the traditional-services subsector which is the lowest paid of the major industry groups. Average hourly wages in this sector are less than two-thirds of the all-industry standard. Nearly 75% of these part-time workers are women. More than 70% of visible minorities in the workforce work in the service sector where they earn on average 25% less than other Canadians in the same occupations.

- Part-time workers are among the most vulnerable in the economy. They are concentrated in the lowest wage ranges, have little employment security and often have low pension benefits or none at all.

The workforce is changing:

- Women and ethnic minorities have entered the workforce in large numbers. Women now represent almost half of the paid workforce - up from 38.7% in 1975 - and account for the greatest proportion of labour force growth. Between 1975 and 1990 the male proportion of the labour force dropped from 61.3% to 54.6%.

- Visible minorities form about 6% of the total Canadian labour force, although 70% of the visible minority workforce is concentrated in Ontario and British Columbia. In Toronto, one out of every six members of the workforce is from a visible minority.

- Women and minority workers continue to work in distinct occupational categories, characterized by low wages, limited benefits, irregular hours, and limited promotion opportunities. Trade union representation and collective bargaining provide an important and effective mechanism for improving the conditions of these and other disadvantaged workers.

Workplaces are changing:

- Larger workplaces, formerly concentrated in core areas of cities and towns, are increasingly located in lower-cost suburban or rural areas. Workplaces are also often located in shopping malls or industrial parks.

- The number of small workplaces is increasing. For example, in 1990-91, more than half of the bargaining units certified at the Ontario Labour Relations Board had 20 or fewer employees.

- The rapid growth of part-time and casual work involving irregular hours, the shift from traditional manufacturing to the expanding service, trade and financial sectors, and the physical location and size of many workplaces, combine to make employees' attempts to organize particularly difficult.

The Act must be responsive to these developments. The right to organize must be equally accessible to all employees, and in particular to the needs of women, minorities and other lower-paid workers in vulnerable sectors of the economy. At the present time, employees in these sectors continue to experience significant difficulties in organizing. Trade union density in Ontario manufacturing, for example, is 41.0% compared to 14.9% in the retail trade. When the effect of unionization in the retail grocery sector is removed, trade union density in the remainder of retail trade falls to 4.4%.

These disparities in levels of unionization do not occur simply because employees in these sectors do not wish to participate in collective bargaining or because some trade unions have failed to adapt quickly enough to the needs of a changing workforce. Rather, a significant contributing factor is the failure of the present Act to respond to the very real impediments to organizing faced by workers as a result of the changing nature of work, the workplace and the workforce.

Ontario's Success Depends Upon Greater Cooperation in the Workplace

Ontario's ability to create wealth and new jobs and to compete successfully in an international trading environment depends on improved labour-management relationships and on increased cooperation between labour, management and the government.

Obviously, there is no guarantee that, in any particular workplace, both parties will recognize this need and will work together to create the necessary preconditions for its achievement. There is, however, growing evidence that, where there is a will to meet the challenge, employee involvement through trade unions can have a strong positive effect on both productivity and job satisfaction and can play a major role in the development of increased workplace cooperation. Workers are more willing to go "all out" and contribute their special knowledge and expertise to improve productivity where they have an independent source of protection, participation and security.

This perspective is supported by the economic success of competitor countries in Western and Northern Europe and elsewhere, where successful social and economic partnerships between the government, trade unions and employers have been created. The government does not believe that it is simply a coincidence that the employees of high-performance companies in these countries are usually represented by strong trade unions and other vehicles providing for independent worker representation. If Ontario is to respond to the challenge of global competition, both employers and trade unions must be willing to encourage and to accept a greater sense of shared responsibility and contribution.

Improved cooperation between labour and management will also depend on our ability to depart from some of the more adversarial aspects of organizing, certification and collective bargaining. For example, trial-like certification hearings entail a high cost for employees, employers and the public alike. Lengthy and adversarial proceedings not only deter employees from seeking and obtaining access to collective bargaining but make a poor start to what is intended to be a cooperative and productive partnership. The government believes that it must do everything possible to minimize the number of irrational and unnecessary disputes between labour and management, and to remove existing impediments to the development of the "high-trust" relationships between the workplace parties which are vital to our future economic success.

The reforms proposed in this discussion paper are designed to result in a more informed, cooperative and accessible organizing and collective bargaining process, and to increase the effectiveness while reducing the cost and delay of the legal processes available to resolve workplace disputes. The improvements being proposed are also intended to produce collective bargaining results consistent with the goals of fairness and equity, enhanced productivity and economic success. In this latter regard, the final section of this paper includes a number of options directed towards the promotion of increased cooperation and partnership in the restructuring and adjustment process.

1.5 THE REFORM PROCESS

- In its Throne Speech in the Fall of 1990, the government stated its commitment to facilitating the right to organize.

- The Ministry of Labour initiated the process of developing policy options for consideration by the Minister of Labour and the government early in 1991. This began with a careful review of the Act in order to identify potential areas for reform.

- In March, 1991 the Minister of Labour appointed an external committee of experts in labour law to assist in the process of identifying reform options. Both business and labour were represented on the committee, which was

chaired by Mr. Kevin Burkett, an experienced arbitrator.

- The labour and business representatives on the Burkett Committee filed separate reports in April 1991. While both groups differed in their approach to labour law reform, Mr. Burkett noted that the committee's work was "a useful step in the reform process in that we have succeeded in identifying a broad range of reform options."

- The reports filed by the Burkett Committee were not endorsed by Mr. Burkett, nor have they been endorsed by the Ministry of Labour or the government. They were considered by the government as part of the ongoing process of developing policy options.

- Also considered were submissions and letters from employers and employer associations (including the Canadian Manufacturers' Association, the Board of Trade of Metropolitan Toronto and the Council of Ontario Construction Associations), trade unions, employees and other organizations.

- The process of developing policy options was completed this summer. The government has now identified some preferred and potential areas for reform, and, prior to introducing legislation, is seeking the views of the public as a further stage in an ongoing consultation process.

2.0 DISCUSSION OF REFORM PROPOSALS

2.1 PURPOSE CLAUSE

The present preamble to the Act provides that "it is in the interest of the Province of Ontario to further harmonious relationships between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Consistent with its objectives in the area of labour relations reform, the government proposes that the preamble be replaced with a purpose clause which would reflect the underlying objectives of the Act more explicitly, and provide greater guidance to the OLRB in exercising its powers under the Act. The purpose clause would set out the following objectives:

- ***To ensure that workers can freely exercise the right to organize by facilitating the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union;***

- ***To improve terms and conditions of employment, employee participation and workforce skills through collective bargaining;***

- ***To enhance the ability of employers and trade unions to adapt to changes in the economy and the workplace;***

- ***To promote harmonious labour relations, industrial peace and the ongoing settlement of differences arising in collective bargaining and under collective agreements between employers and trade unions; and***

- ***To provide for effective, fair and expeditious resolution of disputes requiring third-party intervention or adjudication.***

- *Are all of these objectives appropriate?*

- *Are there other objectives which should be considered for inclusion in a purpose clause?*

2.2 THE RIGHT TO ORGANIZE

The Labour Relations Act recognizes the importance of the right to organize and to participate in collective bargaining. The Act is, however, one of the most restrictive in Canada in that it denies to many employees the right to even make the decision to organize.

The government holds the view that the right of employees to choose whether or not to be represented by a trade union should not be denied - except for the most pressing and significant public policy reasons.

PREFERRED OPTIONS FOR REFORM

a) Maintain the managerial exclusion but amend it to permit supervisory employees to organize and bargain collectively, and require them to be placed in a separate bargaining unit unless the parties agree otherwise.

b) Allow organizing in those parts of the agricultural and horticultural sectors which utilize industrial/factory methods of production, and in the landscape gardening sector.

c) Remove the current exclusion of domestics from coverage under the Act.

d) Remove the current exclusion of professionals from coverage under the Act. The question of whether professionals should be included in the same bargaining unit as other employees would be determined by the OLRB on a case-by-case basis.

e) Permit security guards to join the trade union of their choice, but allow the OLRB to place security guards in a separate bargaining unit where appropriate.

a) Supervisory Employees

The Act does not currently apply to persons who exercise "managerial functions". This restriction is designed to exclude those employees whose managerial responsibilities would result in a conflict of interest with trade union activity to such an extent that it would outweigh their right to organize and to be represented collectively.

The government is of the view that the present line dividing managerial from other employees has the effect of denying collective bargaining rights for employees whose supervisory responsibilities do not give rise to any conflict of interest which justifies a complete denial of the right to organize. For example, the OLRB has excluded as managers persons who make "effective recommendations" in connection with the terms and conditions of employment of other employees, even though these persons do not exercise final decision-making authority. As a result, a large number of front-line supervisors and others are excluded from the Act. These same employees are afforded the right to organize and engage in collective bargaining in British Columbia, Manitoba, Saskatchewan and under the federal jurisdiction.

The government's proposal would maintain the current managerial exclusion but would permit organization by employees who are currently excluded only because they make "effective recommendations" or supervise other employees. This does not mean that potential conflicts of interest should be ignored. The government's proposal seeks to address this issue by requiring that supervisory employees be placed in a separate bargaining unit unless the parties agree otherwise. In other provinces, employers and trade unions have also dealt with the potential for conflict of interest, where necessary, by including special provisions and codes of conduct in their collective agreements.

- *Where should the line be drawn between those supervisory employees who, under this proposal, would have the right to organize, and managerial employees who would continue to be excluded?*

- *Some organizations are replacing traditional hierarchical management systems with "flatter" organizational structures and increased delegation of decision-making authority. What effect does this trend have on the question of extending collective bargaining rights to supervisory employees?*

- *Would the requirement for separate bargaining units adequately respond to concerns about conflict of interest? Are there any other options which should be considered?*

b) Agricultural and Horticultural Employees

Employees working in agriculture are not permitted to organize and bargain collectively under the Act. Employees in horticulture (e.g. gardening) are also excluded if they are employed by an employer whose primary business is agriculture or horticulture. However, horticultural employees working for a municipality and those employed in silviculture (the cultivation of trees in forestry operations) are not excluded from the Act.

These exclusions affect employees working in both family farm settings and industrial/factory-like settings with large, permanent workforces, including "agribusiness" operations such as mushroom factories and chick hatcheries.

Most other Canadian jurisdictions do not exclude agricultural employees from participating in collective bargaining, although some require a minimum number of employees before organization is permitted (e.g. 3-5).

Nevertheless, the government recognizes the position of many agricultural employers that there may well be circumstances unique to agricultural employees and operations which must be considered in deciding upon the most appropriate mechanism for extending the right to organize to agricultural and horticultural employees. For example, the agricultural community has long argued that small family-run agricultural farming operations present special problems in this area.

For its part, the government believes that there is clearly no justification for denying employees working in factory-style agricultural operations the same right to organize enjoyed by employees working in other industrial or manufacturing sectors of the economy, or for denying the right to organize to employees in the landscape gardening sector. Concern has been expressed, however, that it may be difficult to determine in any particular case whether a group of employees is involved in an industrial/factory method of production. As a result, during the consultation period, the government intends to continue its ongoing discussions in this area with representatives of the farming community, with interested trade unions and with other organizations.

In this context, the government invites consideration of the following questions:

- *What factors should be considered in developing a definition that can distinguish between family farm operations and industrial/factory-type operations?*

- *Should the extension of collective bargaining rights be limited to agricultural employees engaged in industrial/factory-type operations? What other approaches should be considered? (e.g. coverage based on a threshold number of employees.)*

c) Domestic Employees

Domestic employees are not permitted to organize and bargain collectively under the Act. These employees are overwhelmingly women; they are frequently immigrants or employed on work permits; and they often work in

relatively isolated and particularly vulnerable situations. Domestic employment is characterized by low pay and in many cases inferior benefits. Only two other provinces exclude domestics from collective bargaining.

The government recognizes that because domestics often work alone or in very small groups, the removal of the existing exclusion of these employees may not result in effective access to collective bargaining arrangements. Where employees work alone, they are not eligible to organize and bargain because, under the Act, there must be more than one employee for collective bargaining to be viable. Even though removing the exclusion may not result in a significant extension of collective bargaining (except where domestics are employed by an agency or work for the same employer in larger groups), retention of the existing exclusion cannot be justified.

Because of the particular difficulties faced by domestics in this area, the government also intends to give future consideration to additional means of enhancing domestics' access to organization and collective bargaining.

- *Are there any additional measures which the government should consider at this time to respond to the particular needs of domestic employees?*

d) **Professional Employees**

Architects, dentists, land surveyors, lawyers and doctors are not permitted to organize and bargain collectively under the Act even when they are in a normal employment relationship with an employer. This exclusion is somewhat anachronistic in that it only covers certain traditional professions and not those which have more recently emerged.

In the past, this exclusion was justified by the view that collective bargaining may be inconsistent with the professional responsibilities of these employees. This view has changed over time as various groups of professionals (including professional engineers, university professors and teachers) have become organized. Many professional employees - particularly those who work in large bureaucratic organizations - now see collective bargaining as a means of protecting and enhancing their professional interests.

Professional employees are permitted to organize and bargain collectively in other Canadian jurisdictions, except in Alberta, Nova Scotia and Prince Edward Island.

The government is not aware of any compelling reasons for continued exclusion of professional employees from the Act. But it recognizes that there may be a distinct community of interest among some professional employees which might result in their inclusion in a separate bargaining unit. As well, the government is interested in hearing the views of professional associations and their governing bodies during the consultation process concerning removal of the professional employee exclusion.

- *Will this proposal effectively balance the right of access to organizing and collective bargaining with any distinct community of interest concerns shared by professional employees?*

- *Should existing collective bargaining relationships involving professional employees operating outside of legislation be considered by the government in determining the scope of any amendments in this area?*

e) **Security Guards' Choice of Trade Union**

Security guards are allowed to organize under the Act but are restricted to joining trade unions which represent security guards exclusively. This is the only restriction of its kind in Canada and is an exception to the principle that individuals should be free to join the trade union of their choice as set out in Section 3 of the Act. This has resulted in security guards having no option other than to join relatively small guard-only trade unions having comparatively little bargaining strength.

The original purpose of this restriction was to prevent conflicts of interest for security guards between their duty as guards and their affiliation with a trade union. The experience of other Canadian jurisdictions has shown, however, that such conflicts do not require separate guards-only trade union representation.

- *Does the OLRB discretion to place security guards in a separate bargaining unit adequately balance any concerns raised about conflict of interest against the principle that employees have the right to choose the trade union of their choice?*

- *Can any remaining conflict of interest concerns be addressed by the parties in collective bargaining?*

- *Would it be more appropriate to presume that security guards should be placed in separate units, unless this is shown to be inappropriate?*

2.3 ORGANIZING ACTIVITY AND THE CERTIFICATION PROCESS

Organizing Activity

Employees can face substantial hurdles when they attempt to obtain trade union representation and certification. Efforts to unionize too often provoke bitter and costly confrontations. Particular difficulties can be encountered by employees in the service, financial and retail sectors of the economy and in small workplaces where employers and employees work in close proximity.

The government believes that these obstacles are at least in part a product of existing restrictions and deficiencies in the content and administration of the Act. These impediments can have a chilling affect on organizing drives and often result in the creation of adversarial relationships between trade unions and employers at the outset of their collective bargaining relationship.

In considering the appropriate scope of reform in this area, it is important to recognize that the Act specifically protects an employer's right to express its views to its employees concerning, and during, a trade union's organizing campaign, so long as the employer does not use coercion, intimidation or undue influence. None of the proposed reforms alters this right.

PREFERRED OPTIONS FOR REFORM

a) ***Require that the OLRB commence a hearing within a fixed time of the filing of a complaint arising from discipline or discharge during or related to an organizing drive (possibilities include seven days after a complaint is filed or seven days after notice of a complaint is received by an employer). The OLRB would also be required to sit on consecutive hearing days until the hearing is completed and issue a decision within 48 hours of the completion of the hearing or as soon as is reasonably practical.***

b) ***Provide a right to engage in lawful organizing activity by trade union organizers and employees on third-party premises or property open to the public, or to which the public usually has access.***

c) ***Require a permanent posting of employee and employer rights under the Act in all workplaces and in the language of the workplace. Require a separate posting advising employees of their rights when an unfair labour practice complaint is made during an organizing campaign, whether the complaint is against an employer or a trade union.***

a) Protection of Employees from Unfair Labour Practices During Organizing Campaigns

The Act currently prohibits employers from discharging or disciplining employees for engaging in trade union activity during an organizing campaign. When the OLRB is satisfied that an employer has violated the Act, an employee who has been dismissed for joining a trade union, for example, can be reinstated. Because it can take a considerable amount of time, however, for the OLRB to resolve an employee's complaint (an average of six months to fully litigate a complaint from the time of filing to its final determination), a discharge can have a very damaging effect on an organizing campaign. Where employees perceive that those joining a trade union may be penalized without effective recourse, they are less likely to actively support an organizing campaign.

The proposed reform would not change the current standards now being applied in hearing these cases, but would rather deal with the speed with which hearings take place. Where unfair actions do occur, there would be quick relief for employees and those employers who act unfairly during an organizing campaign would no longer benefit from delay through litigation. This proposed fast-track hearing model would parallel existing OLRB practice when there is a complaint of an illegal strike or lockout.

- *Does this proposal appropriately respond to concerns discussed above relating to protection of employees from unfair labour practices during an organizing campaign?*

- *Would the expedited hearing proposal give both parties enough time to prepare their case?*

- *Are any mechanisms required to deal with the possibility of frivolous applications under the expedited process, and, if so, what mechanisms are appropriate?*

b) Access to Third-Party Property

Problems with access to property for organizing purposes do not only involve an employer and a trade union. There are also situations where access is difficult because an employer's property is close to or even within the premises of another property owner. This is an area in which the Act has not been responsive to changes in the physical characteristics of the workplace. Unlike traditional workplaces, for which organizing rights were initially contemplated, trade unions have great difficulty in reaching employees in isolated workplaces such as shopping malls and industrial parks.

The Trespass to Property Act makes it an offence to be on a property unless there is a legal right of access. Currently, there is no legal right of access to property for organizing purposes, even though an area may be generally accessible to the public.

The government's proposal would simply extend current organizing rights to circumstances where an employer's property is next to, or within, the property of a third-party. Property rights would be affected only in as much as they could not be used to prevent trade union communications with employees in an organizing campaign where a workplace is surrounded by a semi-public area.

- *Is there a need for specific safeguards to ensure that union organizing does not disrupt business activities?*

- *Are there alternative means by which trade unions could achieve reasonable access for organizing purposes?*

- *Does the proposed option adequately respond to the present restrictions on lawful organizing activity in this area?*

- *Should the right extend to persons engaged in organizing activity on behalf of a trade union?*

c) Notice of General Employee and Employer Rights and Notice of Complaint

Many employees and employers, including those in the small business sector, are not well informed about their lawful rights and obligations during an organizing campaign. In the labour relations area, employers and trade unions agree on the need for better communications about legal rights and obligations during an organizing drive and during any subsequent collective bargaining relationship. A requirement for posting of notices, especially in the language of the workplace, would ensure that more information is communicated about rights under the Act. This approach would build upon the successful approach to posting used under the Occupational Health and Safety Act.

- *Are there other and better means through which employers and employees could become better informed about their rights and obligations under the Act?*

(d) Access to Employees for Organizing

In this area, which deals particularly with access to information about employees, and to employer property, during an organizing campaign, the

government has not decided whether any amendments are required, and therefore has no preferred option at this time.

It is, however, often difficult for trade unions to actually identify and make contact with the persons they wish to organize. It can also be very difficult when only employers have an effective ability to communicate with employees at the workplace and access to employees' home addresses.

The government is interested in hearing views on whether either of the following two approaches could assist in meeting the objective of helping employees to overcome barriers to organizing.

Names of Employees

It is difficult to obtain a list of employees, particularly when there are a large number of employees or a part-time workforce. Trade unions are not legally entitled to obtain a list of employees' names and addresses from an employer. For this reason, trade unions argue that they are at a disadvantage during an organizing campaign because employers alone have the information which enables them to communicate with employees both at the workplace and through written communications to the employees' home addresses. On the other hand, experience elsewhere indicates that there may be substantial concerns about the impact on individual privacy in the event that this information is released.

- *Do concerns relating to individual privacy outweigh the importance of providing this information?*

- *If trade unions had a right to access in this area, should the right be triggered only in certain circumstances (e.g. after a minimum threshold of support has been obtained or only upon an order of the OLRB)?*

Access to Employer Property

Trade unions have no general right to enter an employer's premises to communicate with employees during an organizing campaign. The only exception to this is that Section 11 of the Act provides for trade union access to employer property in those limited circumstances where employees reside on that property.

Access to employers' property is important to union organizers because the workplace is the most efficient and effective location for communicating with employees. On the other hand, employers would be concerned about the impact that open access to their property might have on their day-to-day operations.

- *Are there certain parts of an employer's premises to which access for organizing purposes should be allowed (e.g. where no production is taking place, such as in parking lots, cafeterias etc.)?*

- *If the Board were given a discretion to make access orders, should criteria be set out to guide the Board in the exercise of its discretion, and if so, what criteria?*

- *Should any specific access right be triggered by a preliminary threshold showing of membership support, or by some other objective criteria?*

The Certification Process

The government believes that once it is clear that employees have decided to organize, there should not be unnecessary impediments in the process of obtaining certification and commencing collective bargaining. There are a number of features of the present certification process, however, which frustrate this objective, which result in unnecessary, costly and time-consuming litigation, and which hinder the establishment of a cooperative collective bargaining relationship.

The precise scope and nature of reform to the certification process is of considerable importance to the labour relations community. The government is particularly interested in the views of the public concerning whether its specific package of proposals would result in an appropriate balance of the competing concerns in this area.

PREFERRED OPTIONS FOR REFORM

a) ***Consider evidence of membership in a trade union only as of the date of application for certification. As a result, post-application petitions and revocations of membership evidence would no longer be permitted.***

b) ***Provide that the signing of a membership card is sufficient evidence of support for a trade union, without the need to make a $1.00 payment.***

c) ***Modify the existing OLRB power to certify a trade union in order to remedy an unfair labour practice, by removing the "adequate membership support" requirement while retaining the requirement that the true wishes of the employees cannot be ascertained, and by applying the remedy to violations of the Act by persons acting on behalf of an employer.***

d) ***Provide that the level of support required for certification based on***

membership cards be an absolute majority of employees in the bargaining unit, and that the level of support required for entitlement to a vote be 40%.

e) Require the OLRB to provide the trade union with the list of the employees in the employer's proposed bargaining unit following receipt of that list from the employer.

a) Petitions

The present policy under the Act provides for certification of a trade union based upon its presentation of evidence to the Board that it represents a clear majority of employees. The trade union establishes that it represents employees by obtaining signed membership cards. Where it has membership support of 55%, the trade union is entitled to be certified. Where it has membership support between 45% and 55%, the employees are entitled to vote as to whether or not to be represented by the trade union.

Despite this policy, the legislation currently provides that opposition to a trade union in the form of petitions can be submitted to the Board following the application for certification. In such cases, despite the trade union's demonstration that it has signed up over 55% of employees as members, the Board may order a vote where there are enough signatures on the petition to bring the trade union's support below 55%.

On average, 20% of certification applications involve petitions. An overwhelming majority of petitions are rejected by the Board, however, on the basis that they are numerically irrelevant, fail to meet procedural requirements, or in many cases are influenced by the involvement of the employer, and so are not considered to be reliable evidence of employee wishes. Nevertheless, the time and expense required to oppose a petition results in substantial delay to the certification process, prolonged litigation, frustration for employees seeking to organize and damage to newly created and often fragile bargaining relationships.

Petitions following an application for certification, and the various difficulties they cause, are unique to Ontario. The government's proposal would simply bring Ontario into line with other jurisdictions. Reform in this area would also eliminate the litigation now required, resulting in a simpler administrative process, and cost savings for trade unions, employers and the public.

- *What rules should apply where an employee revokes membership support prior to the application for certification being filed (e.g. a formal requirement that notice of membership revocation be provided to the trade union and the OLRB in a timely way, or a fixed time limit within which a pre-application revocation must be made in order to be valid)?*

b) **Initiation Fees**

The Act requires that employees sign a membership card and pay a fee of at least $1.00 to the trade union in order to be counted as supporting a certification application. Some jurisdictions (such as in Manitoba and Saskatchewan) do not require any membership fee. On the other hand, the fee has never been raised, and it is low in comparison to the fee required in some other Canadian jurisdictions ($5.00 in the federal jurisdiction).

The government proposes that the membership fee be eliminated. Signing a membership card should be regarded as a sufficient expression of support for a trade union. Currently, there are numerous certification applications which can be delayed for months while the Board sorts out allegations that a member did not pay the $1.00, or that it was paid by someone else on behalf of the member. As well, non-pay allegations are sometimes made by opponents of trade unions in order to impede or delay the certification process. This practice could become even more common if post-application petitions are precluded. Finally, the question arises as to whether a monetary payment should be required in order to exercise the right to be represented by a trade union.

In determining a preferred approach in this area, the government considered other alternatives. For example:

- Retaining the fee at the current $1.00. Proponents of this view argue that this payment is a necessary safeguard which, although clearly not requiring a substantial monetary commitment, is intended to ensure that due consideration is given to the decision to join a trade union.

- Raising the fee from its current level. Supporters of this view argue that this change would make the fee as important as it was when first enacted. Depending upon the level to which the fee was raised, concerns have been raised that this could be a financial impediment for low-income employees.

- As an alternative to eliminating the $1.00 requirement, the legislation could restrict the right to raise allegations that the dollar has not been paid to those employees who are directly affected, as in Manitoba and Quebec. The concern with this alternative is that employers would view this as inappropriately restricting their right to participate in a certification hearing.

The government believes that, taking into account these various considerations, elimination of the requirement to pay $1.00 is, on balance,

the preferable approach.

- *Are there options in this area other than those identified by the government?*

c) Unfair Labour Practice Certification

The Act currently provides that the OLRB has the authority to certify a trade union as a remedy where the employer has committed an unfair labour practice. Two prerequisites must be met before the OLRB can exercise this authority. First, the trade union must establish that as a result of the employer's violations of the Act, the true wishes of the employees are not likely to be determined. Second, the trade union must satisfy the OLRB that it has achieved a level of support sufficient for collective bargaining.

The government believes that the second requirement is inappropriate because it can have the effect of rewarding an employer who commits an unfair labour practice early enough in an organizing campaign so as to permanently impair a trade union's ability to obtain "adequate" membership support.

The government's proposal is designed to reduce employer unfair labour practices during an organizing drive. It would remain the case, however, that the OLRB could only make such a certification order where it is satisfied that the nature of the unfair labour practice makes it unlikely that the true wishes of the employees can be determined.

d) Support Required for Certification

The Act allows the OLRB to certify a trade union based on membership evidence where the trade union has established that it represents more than 55% of all of the employees in an appropriate bargaining unit. On the other hand, where a vote is required, (i.e. where 45% of employees have signed membership cards), the trade union must achieve more than 50% support from those employees who vote.

The government is proposing a reduction in the level of support required for certification based on membership evidence, so that a trade union would be certified where it has signed membership cards representing an absolute majority of all employees in the bargaining unit. Such a reform would make Ontario law consistent with the certification process in some other jurisdictions such as: Newfoundland, Prince Edward Island, Quebec and Saskatchewan, as well as the federal jurisdiction.

The government is also proposing, as a complementary reform, to reduce

the existing requirement for a trade union to be entitled to a vote, from 45% to 40%. This would retain the present 10% differential between the level of support required for certification based on membership cards and that required to obtain a representation vote. (In both Quebec and the federal jurisdiction, a representation vote is held if over 35% of employees have signed membership cards.)

Nothing in this proposal would affect the current requirement that a trade union obtain membership support of 35% in order to be entitled to a pre-hearing vote.

- *To what extent is any additional legitimacy which the 55% requirement lends to the certification process outweighed by the fact that a trade union can lose a certification application even where a majority of employees wish to be represented by that trade union?*

- *Given the proposal that a trade union be certified where it has membership support of an absolute majority of employees in the bargaining unit, is it consistent to reduce the present requirement for obtaining a vote to 40%, or is some other percentage more appropriate?*

e) <u>List of Employees Filed by Employer Following Certification Application</u>

Following an application for certification, under the Board's current practice, the employer is required to provide the Board with a list of employees in the proposed bargaining unit, which the Board then provides to the trade union prior to the certification hearing. The government believes that formalizing the requirement to provide the trade union with this list of employees in a timely fashion will result in expedited hearings and the elimination of unnecessary uncertainty and guesswork in the certification process.

The government's proposal to provide the list at this point in the certification process (after the trade union has applied for certification) is to be distinguished from the earlier discussion of whether access to employee names should be available during the course of an organizing campaign.

2.4 STRUCTURE AND CONFIGURATION OF BARGAINING UNITS

The approach to reform discussed in this section deals with issues arising from present OLRB practice relating to the determination of an appropriate bargaining unit at the time of certification, including the status of full and part-time employees. Also discussed is the related question of whether the OLRB should have the discretion to consolidate bargaining units following certification.

PREFERRED OPTIONS FOR REFORM

a) Retain the OLRB's discretion to determine the appropriateness of the bargaining unit at certification, but provide that the OLRB should consider the need to facilitate employees' access to collective bargaining in making this determination.

b) The OLRB should be required to include part-time and full-time employees in a single bargaining unit where the trade union seeks certification of both groups of employees and has overall majority support. Where the trade union does not have overall majority support, but has majority support for only one group of employees, the OLRB would be required to certify a separate full or part-time unit consisting of that group of employees.

a) OLRB Determination of Appropriate Bargaining Units

Under the Act, the OLRB has the discretion to determine the appropriate bargaining unit. The OLRB exercises this discretion to ensure that the bargaining unit established is viable for collective bargaining purposes. It generally takes into account factors such as community of interest among employees and the nature of the employer's operations and organizational structure. Often, these factors lead the Board to prefer larger all-employee units.

The OLRB has attempted to balance these factors against the recognition that if it required employees to organize in too large a bargaining unit, this could deprive them of access to collective bargaining. The government believes, however, that the Act should specifically require the Board to take into consideration the need to facilitate access to collective bargaining in exercising its discretion to fashion appropriate bargaining units. This is particularly important for employees working in sectors where collective bargaining has not taken root, and where existing barriers to organizing mean that insistence on traditional bargaining units can impede access to collective bargaining.

The government's proposal maintains the Board's power to require a viable bargaining unit and to reject the unit applied for by the trade union in appropriate circumstances. At the same time, it seeks to ensure that the determination of appropriateness and viability is informed by the concern that employee access to collective bargaining should not be unnecessarily frustrated or denied.

- *Does the government's proposal adequately balance the objective of facilitating organization with the need to avoid undue fragmentation and to ensure viable bargaining units?*

b) **Full and Part-Time Bargaining Units**

The OLRB has historically differentiated between full and part-time employees when defining appropriate bargaining units. The Board has required separate units for "full-time" employees working 24 or more hours and for "part-time" employees working less than 24 hours, at the request of either the employer or the trade union.

The original rationale for separating full and part-time employees was that they do not share a community of interest. It has become clear, however, that today's part-time worker generally has the same interest as full-time employees. As a result, the separation of full and part-time employees can no longer be justified, and results in discrimination against women, who make up a disproportionate share of the part-time workforce.

Part-time employees face particular difficulties in gaining access to collective bargaining. Their inclusion in a bargaining unit separate from full-time employees has served only to reinforce existing barriers to their ability to effectively exercise their right to organize and to benefit from collective bargaining. This has resulted in poor wages, working conditions and benefits for part-time employees in comparison to their full-time counterparts. The increasing importance of part-time employment in the economy makes it essential to strengthen the right of part-time employees to organize.

For these reasons, labour boards in most other Canadian jurisdictions no longer require that full and part-time employees be placed in separate units.

- *Are there other ways of dealing with the Board's present policy of placing full and part time employees in separate bargaining units?*

- *Would an alternative approach be to require trade unions to organize full and part time employees in the same unit in all cases? What would the advantages and disadvantages of this approach be?*

c) Consolidation of Bargaining Units

Consolidation is another area in which the government has not yet developed a preferred option for reform, nor decided on the extent to which amendments are required.

Currently, while the parties are free to expand or to reduce the scope of bargaining units, neither party can make such a dispute the subject of a strike or lockout. Furthermore, the Board has generally held that it has no power to consolidate bargaining units once it has issued a certificate. By contrast, other labour boards in Canada possess and exercise the power to consolidate bargaining units following certification (for example, in B.C. and under the federal jurisdiction).

It has been suggested that a Board power to consolidate two or more existing bargaining units of the same employer could improve and rationalize the process of collective bargaining from the perspective of both management and labour. Possible advantages include: lowering the costs of separate negotiations; reducing unnecessary multiple work stoppages; providing for a common framework of employment conditions; increasing lateral mobility of employees; combining existing separate units of full and part-time employees; and reducing fragmented bargaining structures to better reflect the employer's operational structure.

The power to consolidate two or more bargaining units of the same employer where the same trade union is involved is viewed as particularly important in the retail, financial, insurance and other areas of the service sector, where there is a predominance of small establishments operated by the same employer.

On the other hand, a number of concerns about explicitly providing the Board with the power to consolidate may be raised. Consolidation of existing bargaining units can raise difficult issues concerning the application of collective agreement provisions, including seniority, and may also raise particular concerns in certain portions of the manufacturing sector where employers point to a trend towards decentralized operations.

Finally, in considering whether the Board should be given the power to consolidate bargaining units, it is also necessary to consider whether it is appropriate and desirable that the power to consolidate also extend to different bargaining units of the same employer, where the trade unions holding bargaining rights are not the same. For example, the Board could be given the discretion, in appropriate circumstances, to require different trade unions to form a council for the purposes of negotiating a central collective agreement.

A number of questions arise for discussion:

- *If the Board was given the explicit power to consolidate two or more existing bargaining units where the same trade union holds bargaining rights, what criteria should be applied in determining whether to exercise a discretion to consolidate? (possible criteria include: the desirability of limiting fragmented bargaining structures; increasing the viability and stability of bargaining relationships; an examination of whether consolidation would give rise to serious labour relations difficulties or would fail to recognize geographic or other differences inherent in the nature and scope of an employer's operations).*

- *Should a distinction be made between the consolidation of existing bargaining units where the same trade union holds bargaining rights, and consolidation where different trade unions hold bargaining rights?*

- *In the latter case, is consolidation consistent with the right of employees to choose and be represented by the bargaining agent of their choice, with union autonomy and craft allegiance or with labour relations stability?*

- *Are there certain sectors or types of operation where the problem of multiple trade unions dealing with a single employer are particularly acute?*

- *In considering the question of whether the Board should have a power to consolidate, should a distinction be drawn between consolidated bargaining and consolidation of bargaining units?*

- *What additional powers would the Board have to be given if the power to consolidate is conferred, either where the same trade union holds bargaining rights or in the case where different trade unions hold bargaining rights?*

2.5 NEGOTIATING THE FIRST COLLECTIVE AGREEMENT

This section deals with two issues - first contract arbitration and just cause protection - which arise in the period following certification of a trade union.

PREFERRED OPTIONS FOR REFORM

a) ***On application by either the employer or trade union, provide for the settlement of a first collective agreement by arbitration where the parties have been in a legal strike/lockout position for more than 30 days and have been unable to reach an agreement.***

b) Provide employees with just cause protection following certification, and under first and subsequent collective agreements (subject to the right of the parties to agree to limit the application of this protection to probationary employees for up to 90 calendar days).

a) Improved Access to First Contract Arbitration

First contract arbitration legislation was passed in Ontario in 1986. This legislation responded to problems faced by some newly organized bargaining units, particularly in the retail and service sectors, which experienced strong employer opposition and lacked sufficient bargaining power to obtain even the minimum terms considered acceptable in collective agreements.

Unlike legislation in Manitoba and Quebec, which generally provides for automatic access to first contract arbitration, Ontario legislation establishes a limited remedy where the parties are having difficulty in achieving a first contract. The Board can only settle a first agreement where it is established that the bargaining process has been unsuccessful based upon a set of prescribed criteria. It is not enough that the parties have been unable to achieve a first contract: extensive litigation may be required in order for either party to establish that the reason for the failure entitles it to a first contract arbitration remedy. This may result in extensive delays, expensive hearings before the Board and lingering animosity at the beginning of the collective bargaining relationship.

The government's proposal would prevent lengthy first contract disputes as well as the need for extensive OLRB litigation. The proposal is intended, however, to support the integrity of free collective bargaining by requiring a pre-application period in which the parties would be required to engage in negotiations and mandatory third-party conciliation. The 30-day period required to trigger access to arbitration would only begin to run following a report from the conciliator that the parties had been unable to reach an agreement and the subsequent two-week waiting period had elapsed. The proposal is not intended as an avenue for either party seeking to avoid the requirement to bargain. Indeed, in order to obtain access to first agreement arbitration both parties would have to face the possibility of a legal strike or lockout occurring and lasting for at least 30-days.

- *To what extent do the proposed requirements for obtaining access to first contract arbitration meet the concern that easing access may inhibit one or both parties from engaging in real collective bargaining?*

- *Should the authority to settle the first agreement be in the hands of private arbitrators or the OLRB?*

b) **Just Cause Protection Following Certification and in Collective Agreements**

Under the Act, employees do not have just cause protection during the time following certification until the first agreement is concluded. The absence of protection where an employee is discharged or disciplined during this period can give rise to serious complications in the first agreement bargaining process. It also deprives employees of protection against unfair treatment at a time when employees may perceive themselves to be at particular risk because of the fragility of the newly-formed bargaining relationship. For this reason, the government proposes to provide for just cause protection in the period following certification (although it has decided not to propose that employees have just cause protection prior to certification during an organizing campaign).

Following certification, most employers agree to just cause protection in the first and subsequent collective agreements. Indeed, protection of this right has become a critical function of trade unions. There are a few cases, however, in which the question of just cause protection becomes a major obstacle to the ability of the parties to successfully negotiate a first collective agreement. The government believes that it is important to minimize unnecessary disputes over such a widely accepted collective agreement safeguard. Indeed, legislation in B.C. and Manitoba already provides deemed just cause protection in a collective agreement.

Under both circumstances where just cause protection is proposed, the government's proposal recognizes the need to make special provision for probationary employees, allowing the parties to agree to limit the application of just cause protection in such circumstances.

- *Should authority to deal with just cause complaints prior to a first agreement be given to the OLRB instead of arbitrators, in light of the possible overlap between unfair labour practice and just cause issues during this period?*

- *Should the extension of just cause protection include ensuring that arbitrators have the authority to substitute a lesser penalty in circumstances where the collective agreement contains a specific penalty?*

- *How should this proposal affect a probationary employee in the period following certification but prior to the parties negotiating a collective agreement?*

- *Is the proposed treatment of probationary employees appropriate?*

- *Are there any other ways in which the Act should be amended in order to facilitate or enhance the representational role of trade unions, beyond providing for just cause protection?*

2.6 IMPROVING COLLECTIVE BARGAINING AND REDUCING INDUSTRIAL CONFLICT

This section deals with the rights and obligations of employers, trade unions and employees during a labour dispute, and includes the government's proposed restriction on the use of replacement workers.

PREFERRED OPTIONS FOR REFORM

a) ***During a labour dispute, prohibit the employer from using the following persons to perform the work of striking or locked-out employees at the establishment subject to the strike or lockout:***

- ***Any persons (including employees, managers, volunteers, contractors and persons supplied by third party employers) hired or engaged between the day notice to commence bargaining is given and the end of the strike or lockout;***

- ***Striking or locked out employees;***

- ***The employer's other non-managerial and non-supervisory employees, whether employed at the struck location or elsewhere; and***

- ***Managerial and supervisory personnel who are not employed at the struck location.***

b) ***Require employers to continue employee benefit coverage during a strike or lockout where this is requested by the trade union, and the union pays the employees' and employer's share of the relevant premiums.***

c) ***Provide employees with just cause protection during a labour***

dispute.

d) Repeal the existing limitations on the right to return to work during a strike (s.73). Where the employer and trade union cannot agree on a return to work protocol, employees should have the right to return to work at the conclusion of a labour dispute, on the basis of their seniority at the time the dispute began, so long as the senior employee is able to perform the available work.

e) Where the employer and trade union voluntarily negotiate provisions allowing employees to refuse to cross lawful picket lines or to handle struck work, provide that this activity does not constitute a strike under the Act.

f) Permit employees to picket on third-party property to which the public ordinarily or customarily has access.

a) Use of Replacement Workers

The Act provides that under specified circumstances (including restrictions on timing), employees have the right to participate in strike action and employers have the right to lock out employees. The Act currently places no restrictions, however, on the ability of an employer to continue to have the work of striking or locked-out employees performed by various categories of replacement workers during a lawful labour dispute.

The government believes that the failure to place restrictions on the use of replacement workers during a labour dispute can lead to bitter and violent confrontations, and reduce the willingness or ability of both parties to engage in meaningful and effective collective bargaining. Replacement workers are also more likely to be used in circumstances involving relatively unskilled and economically insecure workers - often women, visible minorities and other disadvantage groups of workers - who can be quickly and easily replaced. This in itself can be a significant disincentive for these employees to organize and may be a factor in their lower rates of unionization.

The use of replacement workers, and possible prohibitions against this practice, has been the subject of ongoing debate in Ontario since the introduction of "anti-scab" legislation in Quebec in 1978. Central to this debate is the issue of weighing the interest of employees in effectively exercising the right to strike against the interest of employers in continuing to do business during a strike. There is also the overriding public interest in minimizing the disruptive effects of labour disputes, including picket line violence and the avoidance of unnecessarily lengthy work stoppages.

Often overlooked in this debate is the fact that available evidence, though limited, indicates that the use of replacement workers is confined to relatively few situations. Approximately 95% of all collective agreements in Ontario are reached without recourse to strikes or lockouts. Where strikes do occur, many employers do not attempt to operate, or they maintain production or services by using on-site managerial employees. Unfortunately, those disputes in which replacement workers are used to perform the work of striking employees tend to be the most prolonged, the most visible, and the most disruptive to affected communities.

Quebec Legislation

Quebec legislation has prohibited employers from using replacement labour since 1978. This followed a period in which strikes had escalated to record levels, with some of these strikes marked by conflict and violence. The legislation basically prohibits the use of persons, other than managers, from replacing striking or locked-out workers at the establishment where the labour dispute is taking place.

When the legislation was tabled, Quebec's Minister of Labour stated the objectives of the legislation as "not being designed to automatically close plants the moment a strike or lockout is declared. Rather, they are intended to restore a healthy balance between the parties and eliminate practices which lead to tension and violence during disputes."

Quebec's legislation was initially criticized by both employers and the labour movement. The employer community said that the legislation favoured trade unions, while unions took the position that violent picket-line confrontations could only be eradicated entirely by a complete ban on the performance of bargaining unit work. In spite of this criticism, the legislation has remained in effect since 1978. Indeed, the only amendments to the legislation were enacted in 1983, and imposed additional restrictions on the use of replacement labour, including applying the prohibitions on the use of replacement workers to services provided by persons employed by another employer or by contractors, and to managers from establishments or locations other than those involved in the labour dispute.

While it is difficult to assess the precise effect of the Quebec legislation, it seems clear that from the outset, there has been a decline in picket line violence and hostility, as well as a marked improvement in the collective bargaining climate. There is mixed evidence as to whether, in its initial years, the legislation reduced the incidence and duration of strikes, particularly because in a number of disputes the new law was violated. The Quebec Ministry of Labour reports, however, that more recently, (including the period of time following the 1983 amendments) there has been a decline in both the number and length of disputes, which is at least in part attributable to the legislation itself.

Preferred Option for Reform

The government's preferred approach to reform is similar to that used in Quebec. Employers would remain free to continue to operate with existing managerial and supervisory personnel employed at the struck location. As well, work could still be shifted to another location or contracted out to another location.

Employers would, however, no longer be permitted to hire or utilize the service of newly hired workers for the purpose of performing the work of employees on strike or locked out. As well, striking employees would no longer face the prospect of other employees, with whom they work on a daily basis at the same workplace, performing their work; nor would these non-striking employees face the pressure of being required to perform that work.

Under the government's preferred approach, while employers would be able to use managerial and supervisory employees working out of the struck location, they would be prevented from using outside employees at the struck workplace (employees from other non-striking locations, and supervisory and managerial personnel from those locations).

Finally, the government's preferred direction would also prevent employers from using the services of their striking or locked out employees during a labour dispute. In fact, collective bargaining legislation governing community college employees in Ontario currently restricts the ability of employers to use striking or locked out employees during a labour dispute by preventing the employer from paying those employees during the labour dispute.

The government believes that it is unfair that, under the current Act, employees who work during a strike automatically benefit from the collective agreement negotiated at the conclusion of the strike - as a result of the efforts and sacrifices of those employees who participated in and supported the strike. Moreover, the prospect of striking employees watching other employees in the same bargaining unit cross the picket-line in order to perform their work often gives rise to some of the most emotionally charged and hostile picket-line confrontations. Finally, many striking employees - including those in smaller bargaining units - are particularly vulnerable to various pressures and inducements to return to work during a labour dispute.

The Ministry of Labour welcomes the submissions and views of employers, trade unions, employees and other interested groups on all aspects of these issues, including the following questions:

- *What would be the effect of the proposed restrictions on employers in general and on specific sectors or operations in particular?*

- *Are the particular restrictions in this area appropriate?*

- *Should the legislation provide for a strike or ratification vote, and if so, what should the requirements be for conducting these votes? Alternatively, is the current right of an employer to invoke a vote of employees on its final offer sufficient in this regard?*

- *How should the proposed replacement worker provision be enforced?*

Possible Exceptions to Preferred Option

The government recognizes that it is important to consider possible exceptions to the proposed prohibitions on the use of replacement workers, in order to provide for the continued performance of certain services in the event of a work stoppage.

There is likely a specific need for exceptions in the public and quasi-public sectors covered by the Act, particularly in regard to the provision of some health and social services, where public safety or health is put at risk. For the private sector, including manufacturing, the legislation would also likely have to allow for the performance of essential maintenance work during a labour dispute, in order to preserve employer property and equipment.

One approach to the resolution of these issues is a requirement that the parties jointly identify appropriate exceptions and provide for continuation of the performance of necessary services in advance of a work stoppage. Where the parties are unable to agree on these matters, the Board could be empowered to assist the parties and, if necessary, identify and determine:

- the nature and level of services that must continue during the labour dispute in order to prevent, for example, immediate danger to public health and safety, or to preserve employer property and equipment;

- the number of employees required for such purposes; and

- the determination of the specific duties of such employees.

- *Are there other circumstances in which exceptions should be made in order to avoid undue hardship?*

- *Should there be any other limitations or exceptions to the scope or effect of any restriction on the use of replacement workers?*

- *What is the most appropriate mechanism for resolving these issues, recognizing the desirability of doing so prior to the commencement of a labour dispute?*

The government is also aware that a prohibition on the use of volunteers during a strike or lockout could have a negative impact on the delivery of some services in the health and social services sectors. *Should the use of volunteers (e.g. family members) be permitted in these sectors in view of the position of clients served by institutions in these sectors?*

b) Employee Benefits

Once a work stoppage caused by a strike or lockout begins, employees lose not only their normal wages, but also any negotiated benefits they would otherwise receive. Most employers cooperate in arranging for the maintenance of this coverage during work stoppages. In those cases where continued coverage is denied, however, employees are left without the appropriate extended health care, insurance, or pension benefits. Trade unions are generally unable to arrange alternative benefit coverage during a strike, in large measure because the employer normally administers the scheme.

The government's proposal would require employers to continue benefits coverage where the trade union pays the employer and employee share of the relevant premiums. Similar protection is already in place in other jurisdictions, including Alberta, Newfoundland and Manitoba.

- *What difficulties might employers and trade unions have in implementing this proposal?*

c) Just Cause Protection During a Labour Dispute

As discussed earlier in this paper, collective agreements generally require that an employer must show "just cause" for actions involving discipline or discharge. Under current law, employees lose all protection from discipline and dismissal once a legal strike or lockout commences, regardless of any such protection they formerly had under a collective agreement. Thus, even though they are not performing work for the employer during the dispute, employees may nevertheless be disciplined or dismissed, often for strike-related conduct.

Too often, disputes over the return to work of employees who have been discharged during a strike results in increased hostility between the parties, and delay in settlement of the labour dispute. Applying just cause protection during a labour dispute would facilitate the resolution of these disputes, and would balance the right of employers to discharge or discipline employees against the right of employees not to be discharged or disciplined except for proper cause.

- *Should the authority to deal with just cause complaints be given to arbitrators through the existing expedited arbitration process, or to the OLRB, on the basis that strike-related discipline or discharge may touch upon protected statutory rights under the Act?*

d) Right to Return to Work Following a Labour Dispute

While employees remain employees during the course of a strike, their ability to return to their former positions is more limited. Under section 73 of the Act, employees now have the right to return to their former positions only during the first six months of a strike. Following this period, they remain employees, but lose their ability to reclaim their former positions.

The primary effect of this law has been to give striking employees a preferential right to reinstatement over any employees hired during the strike, albeit restricted to the first six months of the strike. Given the government's proposed restrictions on the use of replacement workers, a question arises concerning the continued purpose of or need for the existing right to return to work during a labour dispute under section 73.

Of greater importance in the present context is the fact that nothing under the Act specifically governs the return to work of employees following completion of the dispute. Rather, in resolving many labour disputes, the parties are not only required to successfully negotiate a new collective agreement, but also a protocol for the return to work of striking employees. As is the case with discharge or discipline of employees during a labour dispute, this may complicate the bargaining process, thereby lengthening the dispute even when the collective agreement itself is settled.

The government's proposal, which parallels similar provisions in Manitoba and Quebec, would ensure that the return to work is based on seniority, subject to employees' ability to perform the required work. The government's proposal attempts to recognize an employer's need to facilitate the start-up of operations following a labour dispute.

- *In view of the often unique requirements involved in starting up an operation following a labour dispute, is the procedure for return to work a matter which is better left to be worked out by employers and trade unions on a case-by-case basis?*

- *Are there other factors, in addition to employees' ability to perform the required work, which should qualify a right to return based on seniority?*

e) **Definition of a Strike**

The Act provides a very broad definition of a strike. Any work slowdown or stoppage engaged in by two or more employees on a concerted basis may be treated as a strike, regardless of whether the parties have negotiated the right to engage in that activity under the collective agreement.

The government has decided that the public interest in labour relations stability and industrial peace would not be served at this time if Ontario was to follow the example of certain other Canadian jurisdictions and loosen the current statutory restrictions on strikes during the term of a collective agreement.

The government does believe, however, that where an employer and trade union specifically agree to a provision in their collective agreement allowing employees to refuse to cross a lawful picket line or to refuse to handle struck work, the OLRB should not have the authority to override the agreement of the parties and deem this conduct to be an illegal strike.

f) **Employee Right to Peacefully Picket Third-Party Property**

The right of employees to picket during a lawful labour dispute is significantly restricted as a result of third parties asserting property rights under trespass legislation (the Trespass to Property Act). For example, employees have no right to picket in shopping malls despite the public nature of those premises. In such circumstances, employees may be limited to picketing in areas largely unconnected to the dispute. The third party, in such cases, is able to insulate the employer from one of the natural consequences of the dispute by virtue of its property rights.

The government's proposal in this area would recognize the legitimacy of the right of employees to peacefully picket a struck employer, but at the same time would retain the existing restrictions which require picketing to otherwise be peaceful and lawful.

- *Is there a need for specific safeguards to ensure that picketing activity in public areas such as shopping malls does not unreasonably interfere with the activities of third-party employers?*

The government also intends to conduct a study of the law of picketing, and to make recommendations for reform, although that review will not form part of the current labour relations reform exercise. Jurisdiction over picketing is now shared by the Ministry of the Attorney General and the Ministry of Labour. There has never been a comprehensive study of the complex issues involved in regulation of the respective rights and obligations of employers and employees in the context of picketing activity related to a labour dispute.

- *What areas should be included in the terms of reference of the proposed study?*

2.7 PRESERVATION OF BARGAINING RIGHTS

Obtaining bargaining rights and negotiating a collective agreement can be a lengthy and costly process. These rights are protected by Section 63 of the Act, under which the purchaser of a business is bound by any bargaining rights or collective agreement in effect. In addition, Section 1(4) of the Act gives the OLRB discretion to treat two or more business entities as a single employer for the purposes of the Act.

In considering possible reforms in this area, the government is not proposing fundamental alteration of the existing provisions of the Act. Rather, the government is proposing certain limited amendments in order to address gaps in the current successor rights provisions of the Act.

PREFERRED OPTIONS FOR REFORM

a) ***Provide that the purchaser of a business becomes a party to any proceedings (as if the purchaser were the vendor), including collective bargaining, that are in effect on the date a business is sold, under the Labour Relations Act and under the Hospital Labour Disputes Arbitration Act.***

b) ***Extend the successor rights protection of bargaining rights and collective agreements under Section 63 of the Act to situations in which a sale or transfer is from the federal to provincial jurisdiction.***

c) Amend the related employer provision to confirm the OLRB's authority to declare separate divisions or operations of the same employer to be a single employer for the purposes of the Act.

d) Implement amendments dealing with contracting-in and contract tendering developed in consultation with employers, building owners and trade unions in the contract service sector (detailed below).

a) **Sale Where Collective Bargaining is in Progress**

When a business is sold while collective bargaining is in progress, but no collective agreement has been reached, the trade union retains its bargaining rights but is required to provide the employer with a new notice to bargain. Regardless of time and resources spent in bargaining, the collective bargaining process must begin anew with the new owner. This is a particular problem for trade unions in the health care sector which bargain under the Labour Relations Act but must resolve disputes through interest arbitration under the Hospital Labour Disputes Arbitration Act.

The government's proposed approach to reform in this area is similar to that in place in Manitoba and in the federal jurisdiction. It would ensure that there is no unnecessary delay in collective bargaining following a sale of business.

- *Are there circumstances where it is inappropriate for a purchaser to be placed in the same position as a vendor?*

b) **Federal to Provincial Sale**

While Section 63 of the Act protects bargaining rights and collective agreements in the case of a sale of business, this protection does not extend to sales which involve a transfer of business from the federal to provincial jurisdiction. The government proposes that provision be made to provide for successorship in these cases. This approach would ensure that employees in Ontario would not lose bargaining rights or collective agreements as a result of a sale from the federal to provincial jurisdiction.

c) **Related Employers**

The OLRB has the discretion to declare two separate legal business entities as one single employer for purposes of the Act, where they are under common control and direction. The Board generally exercises this discretion in order to prevent the frustration of a union's bargaining rights, but not the expansion of those rights.

Until a recent decision, the Board had indicated that its discretion might not apply where an employer transfers work to another division or operation which is not a separate legal entity, on the basis that as a matter of law, there are not two legally separate employers.

The government's proposal would simply confirm the Board's recent decision that the related employer provisions apply to separate divisions of the same employer without changing the substance or intent of the related employer provisions. In order to make a related employer declaration, the OLRB would still have to find that separate divisions or operations of the same employer carry out related activities under common control or direction, and that this has or will result in the erosion of the trade union's bargaining rights.

- *Are there other concerns with the related employer provision which should be considered as part of the reform process?*

d) Contracting-In and Contract Tendering in the Contract Service Sector

The Ministry of Labour has been examining some widespread and serious problems in the contract service sector which arise when work is contracted-in to be performed on an owner's premises and where the work is re-tendered and continues to be performed at the premises by a different employer. The Ministry consulted extensively on this issue with employers, trade unions and building owners in the contract service sector during the summer and fall of 1990. A discussion paper outlining proposed changes to the Labour Relations Act and Employment Standards Act was later issued for public comment, and is available from the Ministry of Labour upon request.

The reform suggested in this area does not apply to contracting out, but only to the contracting in of work. The following proposal would apply to building cleaning services, food services and related services. Construction, maintenance and production or manufacturing operations would not be affected.

In situations in which work in the contract service sector is contracted in, transferred from one contractor to another, or returned to employees of a building owner or operator, the combined package of changes would:

- Extend the current protection of bargaining rights and collective agreements applicable in the case of a sale of business under Section 63 of the Labour Relations Act;

- Amend the Employment Standards Act to require successor employers to offer the same or comparable employment to employees of the

former employer and to recognize the service of those employees. All liability for employment standards-related benefits, such as severance pay, would be transferred to the successor employer. This latter amendment would provide greater protection for employees while responding to employer concerns with respect to severance pay obligations in these situations.

2.8 THE GRIEVANCE ARBITRATION PROCESS

The Labour Relations Act requires that the parties resolve disputes under a collective agreement through a grievance and arbitration procedure. Grievance arbitration was intended to provide a quick and informal process through which employees could resolve grievances without resort to job action. Employees, employers and trade unions all have an interest in an effective and efficient arbitration process.

Over the years, arbitration has tended to become legalistic, complex and, therefore, time consuming and expensive. The significant delays and escalating costs characteristic of the present system threaten to undermine the viability of the grievance arbitration process.

In addition to the possible reforms outlined below, the Minister of Labour appointed a tripartite committee made up of representatives of labour, management and the arbitration community to inquire into methods and mechanisms which could improve the grievance arbitration process. The committee's consensus report was issued in late October of this year, and is available for public review and comment as part of this consultation process. The government will be considering the recommendations made by the committee in the course of finalizing its proposals for legislative reform of the grievance arbitration process.

PREFERRED OPTIONS FOR REFORM

a) *All collective agreements should be deemed to include a provision incorporating the employment-related prohibitions set out in the Human Rights Code.*

b) *Confer express power on arbitrators to interpret and apply other employment-related legislation where such legislation is relevant to the administration, interpretation, application or alleged violation of a collective agreement, regardless of whether or not the terms of the agreement are consistent with such legislation.*

c) ***Make the arbitration process more effective and expeditious by:***

-Providing arbitrators with the authority to hear and decide the real substance and merits of the issues in dispute under the collective agreement.

-Providing arbitrators with the authority to determine all questions of fact and law in connection with arbitration proceedings.

-Repealing the current provision allowing the parties to override the authority of the arbitrator to extend time limits.

-Providing arbitrators with the authority to make pre-hearing production orders and orders requiring particulars.

-Providing arbitrators with the authority to make orders and directions as required in order to expedite arbitration proceedings, so long as the parties' right to a fair hearing is not compromised.

-Mandating the use of single arbitrators rather than tripartite arbitration boards, unless the parties agree otherwise.

-Providing arbitrators with the authority to enforce settlements.

a) Deemed Human Rights Protection

Complaints concerning alleged human rights violations often arise in the context of the grievance and arbitration process, for example in relation to allegations that an employer's decision discriminates on the basis of sex, religion or disability.

While the Human Rights Code contains its own investigation and enforcement mechanisms, experience has demonstrated that the Commission's processes take a considerable period of time even to get to the stage where a board of inquiry is appointed to commence a hearing. In the meantime, the same incident can come before an arbitrator under a collective agreement, who must deal with the same evidence and issues that may eventually be litigated before a board of inquiry.

Many trade unions have responded to this cumbersome and time-consuming process by attempting to negotiate human rights protection in their collective agreements and thereby avoid enforcement difficulties. This has

proven difficult in many cases, although it is noteworthy that the Ontario government has negotiated such a provision with OPSEU in its collective agreement governing the Ontario Public Service. While the courts have generally affirmed the authority of arbitrators to interpret human rights legislation, there is still a degree of uncertainty as to the precise circumstances and scope of an arbitrator's jurisdiction in this area.

It is the government's view that providing for the prohibitions against employment discrimination to be incorporated by legislation in all collective agreements would benefit both employers and employees. At the same time, the government is aware of the legitimate concern of employers relating to the potential for the adjudication of a single complaint in multiple forums. Indeed, even at the present time, employers have complained that they can face a multiplicity of proceedings over the same or related matters. Hence, while this proposal is designed to expedite the effective adjudication of workplace issues, it does raise the question of whether there are circumstances when access to alternative avenues of adjudication should be foreclosed.

- *Should the parties be concerned as to whether or not arbitrators possess sufficient expertise to deal with human rights issues?*

- *What is the most appropriate way to balance employer concerns relating to multiplicity of proceedings and the risk of inconsistent findings, against the concern about restricting access to the investigative and adjudicative machinery under the Human Rights Code (for example, because the remedial relief available under human rights legislation from a board of inquiry may not be available from arbitrators)?*

b) Power to Interpret Employment-Related Legislation

Arbitrators are frequently called upon to interpret and apply legislation relevant to an issue which has arisen under a collective agreement. This simply reflects the obligation of the arbitrator, like any adjudicator, to follow the relevant law.

Most, but not all, arbitrators will apply specific legislation where that legislation is inconsistent with a provision in the collective agreement. Other arbitrators will not apply legislation where no ostensible conflict exists with the collective agreement. Thus, in some cases, arbitrators have refused to consider legislation even where relevant to an issue arising under the collective agreement, and the grievor has been forced to pursue alternative remedial avenues under the relevant legislation. The result is a proliferation of litigation in many cases.

The government believes that there are considerable advantages to the parties in consolidating and expediting the decision-making process before one decision-making body: they include avoiding a multiplicity of costs and resources in resolving workplace disputes arising under collective agreements. Legislation in B.C. and Nova Scotia already recognizes the right of arbitrators to interpret and apply employment-related litigation.

- *What are the various means by which dual jurisdiction, and the possibility of conflicting decisions over particular matters, can be avoided?*

- *Should the Act specifically provide for the courts to review an arbitrator's interpretation of employment-related legislation based on a correctness standard of review, rather than reasonableness?*

c) A More Effective and Expeditious Arbitration Process

Deciding The Substance of the Grievance

As noted above, the arbitration system was conceived as a means of providing expeditious resolution of the underlying problems giving rise to workplace disputes under a collective agreement, without stoppages of work. The effectiveness, integrity and credibility of the arbitration process is undermined if grievances are dismissed for the most technical of reasons, for example, because the grievance failed to refer to the specific provisions of the collective agreement. To leave the underlying dispute unresolved in such circumstances is counterproductive to the objective of fostering healthy and cooperative relationships in the workplace.

Moreover, technical objections should not be allowed to prevent arbitrators from applying equitable doctrines to resolve the real dispute between the parties.

The government's proposed approach, which would encourage the arbitration process to assist the parties in resolving the real dispute between them, is similar to that adopted in B.C. and Manitoba. Such a provision would send a clear message to the parties that they should work out their real disagreements, otherwise an arbitrator will have the authority to do so for them.

Dealing With All Questions of Fact and Law

Arbitration boards, unlike the Labour Relations Board, do not specifically have the authority to determine all questions of fact and law. Conferring this authority on arbitration boards would be consistent with the other reforms proposed here to expedite the arbitration process, and to ensure

that arbitration boards can deal effectively with all issues arising before them.

Extension of Time Limits

The Act presently allows arbitrators to extend any relevant time limits under a collective agreement in order to deal with a grievance, so long as there are reasonable grounds to allow the extension and the other party is not prejudiced by it. The parties can agree under the collective agreement, however, to eliminate this power. Where the parties are of unequal bargaining strength, the stronger can insist on negotiating away the right of the arbitrator to waive time limits. As a result, the arbitrator is bound to dismiss an untimely grievance - whatever its merits and whatever the reason for delay.

It would seem inappropriate not to provide arbitrators with the powers we now grant to courts and other tribunals in other statutes to extend time limits where the employer would not be unfairly prejudiced.

Pre-Hearing Production Orders and Particulars

Given that arbitration is supposed to be relatively expeditious and informal, it makes sense to expect that the parties arrive at the hearing fully informed as to the elements of the case. Normally the parties would learn the particulars of the case during the grievance procedure, yet there remain cases in which the arbitration is unable to proceed on the first scheduled hearing day because one party lacks relevant particulars as to the evidence or argument it will have to meet, or has not obtained disclosure of the relevant documentation or materials. The delay associated with the resulting procedural wrangling can be avoided by ensuring that the parties know in advance the case they have to meet.

Authority to Expedite Proceedings

Arbitrators have the general authority to govern their own procedures, but nothing under the Act directs them to minimize unnecessary delays, or to ensure effective proceedings. This proposal would clarify the authority of arbitrators in this area, while also preserving the rights of both parties to present their cases and make their arguments.

Enforcement of Pre-Hearing Settlements

Many grievances are settled short of arbitration. This is beneficial - given the savings in time and money and given that a negotiated settlement is

generally to be preferred to one imposed by a third party. Unfortunately, in some cases, disputes subsequently arise as to compliance with the settlement and can raise the question of the enforceability of a settlement by an arbitrator. While arbitrators generally accept jurisdiction in this area, confirming the authority of arbitrators to enforce settlements would ensure that the parties are encouraged to settle grievances.

Statutory Preference for Sole Arbitrator

The Act requires the parties to a collective agreement to negotiate a grievance arbitration procedure to provide for the final and binding settlement of any issues in dispute under the collective agreement. Where the parties are unable to agree upon such a provision, the Act provides a procedure which is deemed to be included in their agreement.
The arbitration procedure outlined in the Act is based upon the tripartite adjudication model which, for all its advantages, is expensive and leads to delays associated with the appointment of a three-person board. A statutory preference for a single arbitrator could streamline this process significantly to the ultimate benefit of workplace relations. At the same time, this proposal would leave the parties free to choose a tripartite board of arbitration if they wish.

- *The Ministry of Labour invites comments on these and other possible means for improving the effectiveness and expedition of the arbitration process.*

2.9 ADJUDICATION BY THE ONTARIO LABOUR RELATIONS BOARD

The following series of amendments are proposed with a view to improving the administration and enforcement of the Act.

PREFERRED OPTIONS FOR REFORM

a) ***Provide the OLRB with the authority to grant interim orders or relief on such basis and terms as the Board considers appropriate where there has been a complaint that the Act has been contravened.***

b) ***Provide the OLRB with the authority to settle or determine one or more of the terms of a collective agreement where the exiting duty to bargain in good faith has been violated, to the extent required to remedy the violation.***

c) Provide the OLRB with the authority to remit a matter to a board of arbitration where this is required to remedy an unfair labour practice.

d) Provide the OLRB with the authority to enforce a complaint alleging non-compliance with the written terms of any unfair labour practice settlement as though it were a complaint under the Act.

e) Allow the Minister to refer any question to the Board necessarily incidental to the exercise of any power or the performance of any duties or responsibilities under the Labour Relations Act or the Hospital Labour Disputes Arbitration Act by the Minister, and require the Board to report to the Minister on the question.

f) Provide the OLRB with the authority to alter, modify or restrict the operation, application, or terms of a collective agreement in order to determine seniority issues where two groups of employees in different bargaining units are intermingled (including sale of a business).

a) Interim Orders or Relief where there has been a Complaint that the Act has been Contravened

Many decision-making bodies have the power to issue orders on a temporary or "interim" basis while a final decision is being considered. Courts have this power, as do labour boards in Manitoba, Saskatchewan and Alberta, but the OLRB does not.

As a consequence, the Ontario Board is powerless to mitigate, pending the issuance of a final decision, the significant detrimental effects of unfair labour practices during an organizing campaign on employees' willingness to participate in union activities. The Board is similarly unable to make an interim order which would have the effect of mitigating the potentially serious short-term impact on an employer's business of trade union unfair labour practices.

Granting the Board the general authority to make interim orders would have the effect of expediting remedies for unfair labour practices. A broader use of this kind of order may have the further effect of reducing the incidence of unfair labour practices.

A related concern is whether it is necessary or desirable to clarify Board authority to make declarations as to whether a planned activity or action would be in breach of the Act or would give rise to consequences under the Act (e.g. does it violate the statutory freeze provision or will a transfer of business be treated as a sale).

Should the Board be given the authority to issue interim orders determining the legality of a proposed course of conduct on application of a party? In what circumstances and under what conditions?

- *Should the Board be given the specific power to make advance rulings in appropriate circumstances, or would this result in further delay and expense, or in prejudice to a party, because the actual facts would not yet have crystallized?*

- *Are there any additional procedural powers which it has been proposed be given to arbitrators which should also be give to the OLRB (e.g. clarifying the Board's power to order pre-hearing production, or to expedite proceedings)?*

b) Remedial Power for Breach of The Duty to Bargain in Good Faith

Under the Act, employers and trade unions are required to bargain in good faith and make every reasonable effort to reach a collective agreement. This has been interpreted by the OLRB to mean that an employer must recognize a trade union's bargaining rights, participate in rational and informed discussions, be willing to enter into a collective agreement, and provide certain information to trade unions.

The government has seriously considered various proposals to change the substance and content of the bargaining duty. There is no doubt that strengthening the bargaining duty could assist in making collective bargaining more meaningful for many employees. This must be balanced, however, against the recognized importance of the parties themselves working together and bargaining in good faith in order to settle a collective agreement, without the Board determining in all cases whether one or the other is being reasonable or unreasonable. While there may well be circumstances under the present law where the reasonableness of the bargaining positions or proposals pursued by an employer or trade union could be considered to amount to bad faith bargaining, at this stage it is the government's view that this is best left to the Board to consider on a case-by-case basis without statutory modification of the bargaining duty.

Nonetheless, having decided not to reform the substance of the bargaining duty at this time, it is the government's view that it is all the more important to ensure that, where the existing bargaining duty is breached (because an employer refuses to recognize the trade union or refuses to enter into any collective agreement at all, for example), the Board should possess sufficient authority to remedy the breach, including the power to settle one or more of the terms of the agreement in appropriate circumstances.

- *Should there be specific criteria which would guide the Board in the exercise of its remedial power in the case of breach of the duty to bargain (e.g. should the Board be required to consider the option of imposing a brief period for mandatory mediation, or whether other remedies could adequately rectify the breach, prior to applying this remedy)?*

- *Are there circumstances where this remedial authority may be appropriate beyond a breach of the duty to bargain in good faith?*

c) OLRB Remedial Authority To Remit Matter to Arbitrator

The courts have held that the OLRB does not have the authority to remit a matter to an arbitration board for the purposes of rectifying an unfair labour practice, at least where the arbitration proceedings have concluded.

The government's proposal would provide the Board with this authority. This remedial power may be particularly important for an individual employee who alleges that the trade union breached its duty of fair representation in the context of an arbitration proceeding. The employee may have no effective remedy unless the Board can order a second arbitration hearing.

- *What impact would this amendment have on the finality and conclusiveness of the arbitration process? Does it give rise to any jurisdictional problems?*

d) OLRB Authority to Enforce Unfair Labour Practice Settlements

The Act currently allows the enforcement of written settlements of unfair labour practice complaints. Technical arguments can arise based upon the strict wording of the relevant section of the Act, which applies only where "the matter complained of" has been settled. The issue can become whether the whole settlement can be enforced or merely that part of it that relates specifically to "the matter complained of", and whether the Board can enforce the whole settlement where it contains terms which the Board would not have been in a position to direct. This proposal is designed to eliminate such technical arguments and ensure that the Board deals with the merits of the dispute.

e) References From the Minister to the Board

The Act currently permits the Minister to refer certain matters to the Labour Board for its advice prior to the Minister making a decision required by the Act. These include questions concerning the power to appoint arbitrators or conciliation officers and alleged contravention of eligibility requirements for participation in ratification votes in the construction industry. In other instances, the Minister is required to make a decision, but the Act does not

make provision for references to the Board. The power to refer these matters to the Board may assist the Minister in the decision-making process.

f) Power to Resolve Seniority Issues on Intermingling

At the present time, existing bargaining units can be merged or reorganized by reason of the operation of the Act. This proposal would give the Board the power to resolve difficult issues which can arise regarding the effect of a sale or reorganization on seniority rights of different groups of employees.

- *Should the proposed Board power extend beyond seniority issues?*

g) OLRB Administrative Matters

A series of proposals have been suggested which deal with minor and non-contentious technical and administrative issues that arise in the course of the Board's deliberations. Among those changes suggested are those which would amend the Act to:

- Bring bargaining and decertification processes following voluntary recognition into line with those following certification;

- Make receipt of evidence by the OLRB consistent with practice under the Statutory Powers and Procedures Act;

- Allow for continuation of an OLRB hearing by a single vice-chair in the event of the death or incapacitation of a panel member.

- Allow the Board to make its own rules governing the date upon which applications are deemed to be made.

- *Under the present legislation, the Board does not have the power to make its own rules and regulations. They must be approved by Cabinet. Should the Board be given this power?*

- *In some jurisdictions, labour boards are given the power to dispose of complaints or applications without holding a full hearing. Are there circumstances where it is appropriate for the OLRB to be given such authority?*

- *Are there additional circumstances beyond those now contained in the Act in which a single Vice-Chair should be empowered to hear and determine a matter.*

h) Jurisdictional Disputes

Jurisdictional disputes involve workers in different trade unions who contend that they are entitled to perform a particular kind of job or operation. Most jurisdictional disputes arise in the construction industry where there is a disagreement between several building trade unions. Jurisdictional disputes can also arise in other industries, albeit less frequently.

If the parties are unable to resolve a jurisdictional dispute, section 91 of the Act allows the Board to hear the matter and issue a decision. Under the current provision, twenty to thirty day hearings are common and constitute an increasingly disproportionate drain on the Board's resources, and those of the parties.

Efforts have been underway for some time among interested parties in the construction industry to develop an effective and expeditious means of dealing with these disputes that would make it unnecessary to bring them before the Board. Should these efforts be successful, and a procedure developed that all are reasonably satisfied with, this could reduce the need to modify the existing procedures governing jurisdictional disputes before the Board.

In the meantime, the Board itself has suggested that jurisdictional disputes should be re-cast to provide a procedure (as in some other jurisdictions) where these disputes could be dealt with by the Board on the basis of a one-day "consultation", with the parties represented by their designated jurisdictional disputes specialists. It would be for the Board to determine whether oral evidence would be helpful to its disposition of the case on any particular issue or issues, and the Board would have the authority to make interim or final orders on the matters before it as it sees fit.

- *Would this approach be helpful in improving the Board's handling of jurisdictional disputes?*

- *What alternatives should be considered? Is the status quo acceptable?*

3.0 ADJUSTMENT AND CHANGE IN THE WORKPLACE

The growth in international competition over the past decade has contributed to unprecedented pressure for change in workplaces in almost every sector of Ontario's economy. As discussed earlier in this paper, Ontario's ability to create wealth and new jobs and to compete successfully in an international trading environment depends on improved labour-management cooperation in responding to the pressures associated with new work organization, technological change and changing skill requirements. Cooperative approaches are especially vital to respond to the restructuring that can involve large layoffs.

The Ministry presents below a number of options for discussion, as well as some preferred directions for reform, which focus on fostering cooperation and partnership in the restructuring and adjustment process.

3.1 A Work Organization and Adjustment Service

Our labour relations system is currently designed to promote stability during the life of a collective agreement, rather than to facilitate accommodation to major change. There is no mechanism for constructive dialogue during the term of a collective agreement, nor expectation that this will occur. Indeed, the present system discourages such dialogue outside of negotiations for renewal of a collective agreement every two or three years.

Some employers and trade unions are making determined efforts to jointly talk about and deal with issues relating to organizational change and restructuring outside of the constraints of the collective bargaining system. The government recognizes that this is a significant but very difficult endeavour, and it believes that it has a responsibility to help.

The government proposes the establishment of a new service which would work with employers and trade unions, at the workplace and at sectoral levels, and which would provide a coordinated package of services to assist them in responding to changes in the workforce, technology and the economy. The mandate of the service would be to help employers and trade unions respond positively to pressures for change through cooperation and innovation rather than conflict.

The service would require close links with existing government training, adjustment, mediation, and collective bargaining information services. It would not replace the government's existing mediation and conciliation services which assist workplace parties in collective agreement disputes, although it could provide information and assistance, when requested, on restructuring and adjustment issues.

To be acceptable to the workplace parties, the advisory service would have to be credible, impartial and independent. To get it started quickly, the service could be established jointly by the Ministries of Labour and Industry, Trade and Technology under the guidance of an appropriate external advisory committee. In the longer term, it is important to ensure that the appropriate linkages exist while also achieving the needed credibility and independence. One option could be for the new Ontario Training and Adjustment Board, which will be governed by the workplace partners and other interested parties, to assume ultimate responsibility for the service.

Four major forms of assistance would be provided by the service:

1) **Expert Advice:** Multidisciplinary teams of professionals in industrial relations, organizational development and training would assist employers and trade unions in resolving, on a firm-by-firm or sectoral basis, issues relating to such matters as the introduction of new forms and patterns of work organization, job demarcations, reskilling requirements and technological change.

2) **Mediation Services:** Coordination and extension of current collective bargaining information and preventive mediation services to foster cooperative, bi-partite responses to economic change and adjustment.

3) **Brokerage:** Assistance to employers and trade unions in planning their response to adjustment pressures and in accessing appropriate services in the public and private sectors.

4) **Information:** Information would be made available on the extent and forms of new patterns of work organization through publications, conferences and seminars.

- *What should be the structure, functions and procedures of the proposed Work Organization and Adjustment Service? How vital is it that it be governed from the outset by the workplace parties?*

- *Should the service be targeted at particular sectors and/or firms of a particular size, at least in its initial phase of operation?*

- *Should the service be available only when jointly requested by an employer and trade union, or upon the request of either one of them?*

- *What other measures can and should the government take to encourage or require employers and trade unions to sit down and discuss concerns relating to various aspects of a company's operations, including organizational flexibility and innovation, and other aspects of workplace restructuring?*

- *What mechanisms are available to ensure that both parties are provided with sufficient information and other resources to make those discussions meaningful? Should there be any obligation on the parties to provide relevant information to each other while discussing these questions?*

3.2 A Forum for Examining Workplace Flexibility, Productivity and Adjustment

While a Work Organization and Adjustment Service would provide concrete assistance at the workplace and sectoral levels, there remains a need to bring labour and management together with government at the broader provincial level to develop broad strategies for responding to restructuring and adjustment issues. This suggests the creation of a body which could advise the government and serve as a "sounding board" for public sector and private sector initiatives in these areas.

One approach would be to establish a Task Force of the Premier's Council on Economic Renewal. This would build on an existing body already established for the purpose of bringing labour, management and business together, and which has a record for significant consultations among these groups. A Task Force of the Council could be set up to propose appropriate policy and program reforms, disseminate information about successful experiments in organizational innovation and examine alternative methods of protecting job security when job classifications and work rules are loosened. The Task Force could sponsor and make available studies and reports, as well as undertaking other initiatives, such as conferences and forums, bringing together Ontario and international business and trade union leaders. It could also provide advice on the implementation of the new Work Organization and Adjustment Service.

An alternative approach would be to establish a highly visible commission (e.g. a Workplace Organization Renewal Commission) which would report to the Legislature. It might undertake the activities proposed above for the Premier's Council Task Force: but it would also have the ability to undertake studies or inquiries relating to labour/management issues of major significance at the direction of the Legislature. It could be bipartite or multipartite and would have a full-time secretariat.

- *Would a Premier's Council Task Force or a Workplace Organization Renewal Commission contribute to the development of new understandings around productivity, flexibility and job security?*

3.3 Regulating the Adjustment Process in Mass Layoffs

Workers in Ontario are losing long-held jobs in large numbers. Job losses

resulting from plant closures involving at least 50 workers have increased by 84% since the 1982 recession compared with a 17% growth in the Ontario labour force over the same period. For this reason, special attention should be given to reforming the regulatory environment for the adjustment process in mass layoffs.

Over the early months of 1991, the Ministry of Labour consulted with more than 60 business, labour, community and other interest groups on options for a comprehensive package of labour adjustment regulatory reforms including layoff notice, severance and other adjustment issues. There were strong responses from all quarters. Labour felt that there was a pressing need for legislation to improve the protection of workers from the arbitrary practices of some employers and to acknowledge employers' obligations to involve their employees in decisions around mass layoffs. Employers were concerned that new measures should not penalize all employers, but should deal with the few that are irresponsible and felt that reforms should take into account the cumulative burden of all regulation on the business community. Business, labour and community groups were all in agreement that appropriate training and other supports were vital to an effective adjustment environment in the province.

One major part of the response to the issues raised during the consultation process lies in implementation of the government's economic renewal initiatives. Nothing that is done to assist employers and employees through closures and layoffs should be seen as a replacement for the measures that equip both of them to prepare for, and successfully respond to, the major restructuring and adjustment process they will inevitably face.

The government proposes not to deal at this time with: reforms of statutory notice and severance pay requirements in mass layoffs; establishing new requirements for notice of, and bargaining over, technological change; or mechanisms for reviewing alternatives to plant closures and other mass layoffs. The Ministry of Labour will continue to conduct detailed analysis of these issues. It will also monitor the adjustment practices of employers, employees and trade unions to determine the magnitude of change required in these areas.

The government does propose to proceed at this time with regulatory standards which would contribute to ensuring that the adjustment process works effectively. These changes are designed to promote the development of greater labour-management partnership in the process without excessive government intervention and interference in plant-level, labour-management relations. Specifically the government proposes the following:

i) **Requirements for Additional Information**: Provide that more information be reported to the Ministry of Labour and to workers regarding adjustment measures and consultations planned or

undertaken by the employer so that appropriate supports can be given in mass layoff situations. These additional reporting requirements would be consistent with the types of information now disclosed. Employers could be asked, for example, whether an adjustment committee has been formed (or is planned); and what alternatives to closure/layoff have been explored with workers.

ii) **A Code of Best Adjustment Practice:** The government proposes to release a code of best adjustment practice based on the model proposed in the 1989 Premier's Council Report on People and Skills in the New Global Economy. This code goes beyond the minimum standards in the Employment Standards Act and would therefore not be mandatory. Public education programs would make the code widely understood and encourage its use.

iii) **Clarification of Existing Ministerial Discretion:** Clarification of the existing Ministerial discretion under Section 40(5) of the ESA to require, where appropriate, employers to discuss adjustment measures or alternatives to mass layoffs with their workers.

iv) **Creating a Statutory Duty to Bargain an Adjustment Plan:** This proposal would provide, in unionized establishments, a duty to bargain in good faith towards a labour adjustment plan whenever an employer is planning a closure/mass layoff. The Office of Mediation and/or the newly established Work Organization and Adjustment Service could be made available, either formally or informally, to assist the parties in negotiating an adjustment plan. The OLRB would adjudicate in cases where bad faith bargaining is alleged. Remedies would focus on ensuring that real discussion takes place, not on imposing a labour adjustment plan or closure agreement.

This provision would neither affect the employer's prerogative to close or carry-out layoffs nor create a right to strike or lockout over the plan. Discussions could take place before or shortly after notice of termination has been given to employees.

A similar obligation could be extended to the unorganized sector.

- *Would the proposed regulatory reforms and the options for adjustment assistance discussed here help to promote new agreements around workplace flexibility and job security?*

- *What remedies should the government prescribe for failure to bargain in good faith toward an adjustment plan?*

- *Should the duty to bargain with employees in the development of an adjustment plan be extended to the unorganized sector of the economy? How would it be ensured that the workers participating in consultations were representative?*

- *Are there any other areas, beyond closure and mass layoffs, where the parties should be required to engage in discussions, consultations or negotiations when issues arise during the course of a collective agreement without being required to reopen the agreement - for example, certain other matters that substantially affect employment security?*